

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEMARIS WALKER,	§	
	§	No. 214, 2003
Defendant Below,	§	
Appellant,	§	
	§	
v.	§	Court Below: Superior Court
	§	of the State of Delaware
STATE OF DELAWARE,	§	in and for Sussex County
	§	
Plaintiff Below,	§	Cr. ID No. 0203014277
Appellee.	§	

Submitted: October 7, 2003
Decided: December 18, 2003

Before **VEASEY**, Chief Justice, **HOLLAND** and **BERGER**, Justices.

ORDER

This 18th day of December, on consideration of the briefs of the parties, it appears to the Court that:

1) Demaris Walker appeals from his convictions, following a jury trial, of three counts of rape second degree, burglary, theft, and other related charges. Walker argues that his convictions should be overturned because the trial judge failed to conduct an evidentiary hearing before denying his motion to exclude evidence of a prior bad act. He also contends that the trial judge erred in refusing to merge the three rape convictions for purposes of sentencing.

2) On March 9, 2002, 84-year-old Ruby Wilson was outside watering flowers when Walker entered her apartment and stole her pocketbook, which contained Wilson's driver's license, car keys and apartment keys. The next evening, as Wilson was getting ready for bed, someone knocked on her door. She opened the door a crack, and saw a tall black man, later identified as Carlton Harding, standing in front of her door, and a shorter black man, later identified as Walker, standing in front of her neighbor's door.

3) Suddenly, Walker pushed open the door, knocking Wilson backward. Walker dragged Wilson into her bedroom while Harding ransacked the apartment. Walker then told Harding to hold Wilson's legs while Walker raped her, first with his fingers, then with a water bottle, and finally with a metal shaving cream can that he shoved into her rectum. After the attacks, Wilson managed to get to her kitchen and push the emergency call button on her walker. The two men then fled.

4) Wilson called for help, and her neighbor, Vandyke Ford, responded. When he learned what had happened, he called the police and stayed with Wilson until the police arrived. Meanwhile, Harding and Walker realized that they had left behind the yellow plastic bag containing the objects used to rape Wilson. They decided that they would return to Wilson's apartment and that Harding would go in and retrieve the bag. Harding saw Ford in the apartment and suggested that he would help out by removing

the trash, but Ford told Harding that nothing was to be removed. At that point, Harding went up to one of the responding police officers and confessed. When the police searched Walker's house, they found Wilson's keys under the cushion of a chair in Walker's bedroom.

5) Walker moved to exclude testimony about the burglary and theft the day before Wilson was raped. He argued that, under the analysis required by *Getz v. State*¹, this "bad act" evidence was not plain and conclusive, and its prejudicial effect outweighed its probative value. On appeal, he also argues that the trial court erred in failing to conduct an evidentiary hearing before ruling on his motion.

6) We find no plain error in the trial court's failure to hold an evidentiary hearing.² The State described, in some detail, how it was going to establish Walker's involvement in the burglary and theft. The evidence included: Harding's testimony that Walker confessed to him; the discovery of the victim's car keys hidden in Walker's bedroom; and the discovery of the victim's car near Walker's apartment. Walker pointed out that he had denied having any involvement in the burglary (or rapes); that Harding was a co-defendant who had pled guilty to a lesser charge; and that only one of many items in Wilson's purse was found in his bedroom.

¹538 A.2d 726 (Del. 1988).

²*Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986)(To be plain error, it must be "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial.")

Nonetheless, the trial court concluded that the evidence was strong enough to satisfy the *Getz* clear and convincing standard. We agree, and find nothing in this record to suggest that the result would have been any different if the trial court had held an evidentiary hearing before ruling on the motion.

7) Walker also complains that the trial court erred in finding that the probative value of the bad act evidence outweighed its prejudicial effect. This argument, likewise, lacks merit. The victim was unable to identify either of the two men who attacked her. Thus Harding's testimony, and the evidence that corroborated his testimony, was critical to the State's case. Although the evidence was very prejudicial, we find no abuse of discretion in the trial court's determination that its probative value was so great that it outweighed the prejudice.

8) Finally, Walker contends that there was insufficient evidence to support three rape charges and that they should have been merged into one count. We disagree. Walker penetrated different orifices with three different objects. "One is not allowed to 'take advantage of the fact that he has already committed one sexual assault on the victim and thereby be permitted to commit further assaults on the same person with

no risk of further punishment for each assault committed. Each act is a further denigration of the victim's integrity and a further danger to the victim."³

NOW, THEREFORE, IT IS ORDERED that the judgments of the Superior Court be, and the same hereby are, AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice

³*Feddiman v. State*, 558 A.2d 278, 289 (Del. 1989)(quoting *Harrell v. State*, 277 N.W.2d 462, 469 (Wis. 1979)).